

UNITED STATES OF AMERICA,
NEW MEXICO ENVIRONMENT DEPARTMENT,

V.

Defendant.

Civil Action No.

Plaintiffs, the United States of America, by and through the authority of the Attorney General of the United States and through the undersigned attorneys, acting at the request of the Administrator of the United States Environmental Protection Agency (“EPA”), and the State of New Mexico, by and through the authority of the New Mexico Environment Department (“the State”), hereby file this Complaint and allege the following.

1. This is a civil action filed pursuant to Sections 106 and 107 of the Comprehensive Environmental Response, Compensation and Liability Act, as amended (“CERCLA”), 42 U.S.C. §§ 9606 and 9607, for abatement of an imminent and substantial endangerment resulting from actual and threatened releases of hazardous substances from the AT&SF Albuquerque Superfund Site, Albuquerque, Bernalillo County, New Mexico (“Site”), and for recovery of response costs that have been and will be incurred by the United States and the State in response to releases and threatened releases of hazardous substances from the Site. This action is also brought pursuant

to the New Mexico Water Quality Act (“WQA”), NMSA 1978, § 74-6-11, for abatement of an imminent and substantial endangerment resulting from pollution sources at the Site; and the New Mexico Hazardous Waste Act (“HWA”), NMSA 1978, § 74-4-13, for abatement of an imminent and substantial endangerment resulting from the handling, storage, treatment, transportation, and disposal of hazardous or solid wastes at the Site. Pursuant to Section 113(g)(2) of CERCLA, 42 U.S.C. § 9613(g)(2), the United States and the State also seek a declaratory judgment on liability that will be binding on any subsequent action or actions to recover further response costs or damages.

JURISDICTION AND VENUE

2. This Court has jurisdiction over the subject matter of this action pursuant to Sections 106, 107 and 113(b) of CERCLA, 42 U.S.C. §§ 9606, 9607 and 9613(b), and 28 U.S.C. §§ 1331, 1345, and 1367.

3. This action arises from the transaction of business by Defendant within the State of New Mexico.

4. Venue lies in the District of New Mexico under Sections 106 and 113(b) of CERCLA, 42 U.S.C. §§ 9606 and 9613(b), and 28 U.S.C. § 1391, because these claims arise in connection with actual and threatened releases of hazardous substances from a facility which is located within this judicial district.

DEFENDANT

5. The Defendant, The Burlington Northern and Santa Fe Railway Company (“BNSF”), is a corporation, incorporated under the laws of the State of Delaware, and doing business in the State of New Mexico.

6. The Atchison, Topeka & Santa Fe Railway Company (“AT&SF”) was incorporated in

Kansas, on or about December 12, 1895, and then reincorporated again in Delaware on or about October 10, 1969. AT&SF owned and operated the Site from approximately 1907 to 1996.

7. The Burlington Northern Railroad Company ("BNRR") was incorporated in the State of Delaware on or about January 13, 1961.

8. The Burlington Northern and Santa Fe Railway Company is the successor in interest to AT&SF with respect to AT&SF's liabilities under CERCLA arising from ownership and operation of the Site. Such liabilities of AT&SF became liabilities of BNSF through a merger on or about December 30, 1996. In connection with the merger, AT&SF merged with and into BNRR and BNRR changed its name to BNSF.

9. The Burlington Northern and Santa Fe Railway Company has been the owner and operator of the Site since 1996 and through its predecessor AT&SF, BNSF was the owner and operator of the Site from 1907 to 1996, including all times when hazardous substances were disposed and released into the environment at the Site.

GENERAL ALLEGATIONS

10. The allegations in paragraphs 1 through 9 of this Complaint are realleged and incorporated herein by reference.

11. The Site is located at 3300 Second Street, SW, in the South Valley area of the City of Albuquerque, Bernalillo County, New Mexico, and consists of approximately 28 acres.

12. The Atchison, Topeka and Santa Fe Railway Company owned and operated a wood pressure treatment plant ("Plant") at the Site from approximately March 1908 to January 1972.

13. Wood preservatives were used in pressure treatment at the Plant, including creosote, creosote petroleum mixtures, zinc chloride and pentachlorophenol ("PCP").

14. The Plant included: (1) a wood treatment area where large pressure cylinders known

as retorts were used to inject wood preservatives into the wood; (2) a drip track area used to move wood to and from the treatment cylinders; (3) a tie storage area, where treated ties were stored and allowed to dry; (4) a wastewater reservoir; and (5) a wastewater discharge ditch which received overflow from the wastewater reservoir and discharged to the Barillas Ditch on the west side of the Site.

15. Wood treatment operations at the Site during the March 1908 to January 1972 period resulted in the discharge and release of hazardous substances, including PCP, zinc chloride, creosote and its constituents, including benzene, benz(a)anthracene, benzo(a)pyrene, benzo(b)fluoranthene, benzo(k)fluoranthene, bis(2-ethylhexyl)phthalate, chrysene, dibenz(a,h)anthracene, dibenzofuran, Indeno(1,2,3-c,d)pyrene, naphthalene, and zinc. These hazardous substances were discharged and released into the air, ground, surface and sub-surface soils, surface water, and ground water at, above, below, and surrounding the Site. Among other things, creosote and other preservative waste streams in process condensate, vacuum water and wash water from retort operations were routinely spilled and dumped on the ground in the wood treatment area, creosote and other preservative wastes routinely dripped to the ground in the drip track and tie storage areas, and condensate water and process waste water from retort operations containing creosote and other preservative wastes were regularly discharged to the wastewater reservoir, overflowed into the wastewater discharge ditch and discharged to the Barillas Ditch.

16. PCP, zinc chloride, creosote and its constituents, including the compounds listed in paragraph 15 above, are hazardous substances as defined in section 101(14) of CERCLA, 42 U.S.C. § 9601(14), and in 40 C.F.R. § 302.4.

17. PCP, zinc chloride, creosote and its constituents, including the compounds listed in paragraph 15 above, are water pollution within the meaning of the WQA, NMSA 1979 §§ 74-6-

2(B) and 74-6-11(A).

18. PCP, zinc chloride, creosote and its constituents, including the compounds listed in paragraph 15 above, are hazardous and solid wastes within the meaning of the HWA, NMSA 1978, §§ 74-4-3(K), 74-4-3(O), and 74-4-13(A).

19. In 1972, the Plant was dismantled and the only physical feature remaining on-Site is the wastewater reservoir/wastewater sump.

20. In July and August of 1990, AT&SF excavated from the wastewater reservoir and disposed of approximately 8,250 tons of creosote-contaminated soil and debris in connection with a State approved action.

21. On or about December 16, 1994, EPA placed the Site on the National Priorities List (NPL). 59 Fed. Reg. 65212, 65221 (Dec. 16, 1994); 40 C.F.R. § 300 App. B.

22. In 1994, AT&SF entered into an Administrative Order on Consent (AOC) with the EPA for the purpose of carrying out a Remedial Investigation and Feasibility Study (RI/FS). AT&SF initiated the work required by the AOC, and, following the merger in 1996, BNSF continued with work required by the AOC.

23. In April 1999, EPA issued a Unilateral Administrative Order which required BNSF to conduct a removal action at the Site. In response to the Order, BNSF removed approximately 1,100 cubic yards of sludge, process residue, and creosote-contaminated soil and debris from the wastewater reservoir, as well as contaminated soil beneath it. Approximately 6,012 tons of waste, filling 83 railroad gondola cars, were removed from the Site.

24. The RI, along with a ground water FS and a soils FS, were completed by BNSF in 2001, and approved by EPA pursuant to the 1994 AOC. The RI documented that most organic contamination found at the Site occurs as a dense non-aqueous phase liquid (DNAPL) that is

estimated to total between 59,300 and 70,000 gallons. Ground water contamination at the Site has been found in the two aquifers that comprise the Rio Grande Alluvium, as well as the upper Santa Fe Formation Aquifer; and it has two different components: a DNAPL plume and an aqueous contaminant plume. Soil contamination across the site is fairly uniform, with varying polynuclear aromatic hydrocarbon (PAH) contaminant levels in different locations.

25. On or about June 27, 2002, the EPA issued a Record of Decision ("ROD"), which selected a remedy to address contamination at the Site. The selected remedy requires, among other things, in-situ solidification/stabilization, capping and runoff management for soils that do not contain DNAPL, excavation and off-site incineration of DNAPL contaminated soil, and pumping and treatment of contaminated ground water.

LAW GOVERNING CLAIMS FOR RELIEF

26. Section 104(a)(1) and (b)(1) of CERCLA, 42 U.S.C. §§ 9604(a)(1) and (b)(1), provide in pertinent part:

104(a)(1) - Whenever (A) any hazardous substance is released or there is a substantial threat of such a release into the environment, or (B) there is a release or substantial threat of release into the environment of any pollutant or contaminant which may present an imminent and substantial danger to the public health or welfare, the President is authorized to act, consistent with the national contingency plan, to remove or arrange for the removal of, and provide for remedial action relating to such hazardous substance, pollutant, or contaminant at any time (including its removal from any contaminated natural resource), or take any other response measure consistent with the national contingency plan which the President deems necessary to protect the public health or welfare or the environment.

104(b)(1) - Whenever the President is authorized to act pursuant to subsection (a) of this section, or whenever the President has reason to believe that a release has occurred or is about to occur, or that illness, disease, or complaints thereof may be attributable to exposure to a hazardous substance, pollutant, or contaminant and that a release may have occurred or be occurring, he may undertake such investigations, monitoring, surveys, testing, and other information gathering as he may deem necessary or appropriate to identify the existence and extent of the release or threat thereof, the source and nature of

the hazardous substances, pollutants or contaminants involved, and the extent of danger to the public health or welfare or to the environment. In addition, the President may undertake such planning, legal, fiscal, economic, engineering, architectural, and other studies or investigations as he may deem necessary or appropriate to plan and direct response actions, to recover the costs thereof, and to enforce the provisions of this chapter.

27. The President has delegated his authority under subsections 104(a) and (b) of CERCLA, 42 U.S.C. §§ 9604(a) and (b), to the Administrator of the EPA, who has properly re-delegated such authority to the Regional Administrator of EPA Region 6. The EPA Region 6 Regional Administrator has properly re-delegated such authority to the EPA Region 6 Superfund Division Director.

28. Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), provides in pertinent part:

In addition to any other action taken by a State or local government, when the President determines that there may be an imminent and substantial endangerment to the public health or welfare or the environment because of an actual or threatened release of a hazardous substance from a facility, he may require the Attorney General of the United States to secure such relief as may be necessary to abate such danger or threat, and the district court of the United States in the district in which the threat occurs shall have jurisdiction to grant such relief as the public interest and the equities of the case may require.

29. The President has delegated his authority under subsections 106(a) of CERCLA, 42 U.S.C. §§ 9606(a), to the Administrator of the EPA, who has properly re-delegated such authority to the Regional Administrator of EPA Region 6.

30. Section 107(a) of CERCLA, 42 U.S.C. § 9607(a), provides in pertinent part:

Notwithstanding any other provision or rule of law, and subject only to the defenses set forth in subsection (b) of this section -

- (1) the owner and operator of a vessel or a facility,
- (2) any person who at the time of disposal of any hazardous substance owned or operated any facility at which such hazardous substances were disposed of,

...

(4) . . . from which there is a release, or a threatened release which causes the incurrence of response costs, of a hazardous substance, shall be liable for –

(A) all costs of removal or remedial action incurred by the United States Government or a State or an Indian tribe not inconsistent with the national contingency plan

31. Section 113(g)(2)(B) of CERCLA, 42 U.S.C. § 9613(g)(2)(B), provides in pertinent part:

In any such action described in this subsection [actions for recovery of costs under section 107], the court shall enter a declaratory judgment on liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages.

32. The WQA provides in pertinent part:

If a constituent agency determines upon receipt of evidence that a pollution source or combination of sources which it has been delegated authority by the commission poses an imminent and substantial danger to public health, it may bring suit in the district court for the county in which such a source is located to . . . restrain immediately any person causing or contributing to the alleged condition from further causing or contributing to the condition.

NMSA 1978, § 74-6-11(A).

33. The HWA provides in pertinent part:

Whenever the [Secretary of Environment] is in receipt of evidence that the past or current handling, storage, treatment, transportation or disposal of any solid waste or hazardous waste may present an imminent and substantial endangerment to health or the environment, he may bring suit in the appropriate district court to immediately restrain any person . . . who has contributed or is contributing to such activity.

NMSA 1978, § 74-4-13(A).

FIRST CLAIM FOR RELIEF- RESPONSE COSTS

34. The allegations in paragraphs 1 through 33 of this Complaint are realleged and incorporated herein by reference.

35. The Defendant BNSF is a person within the meaning of Sections 101(21) and 107 of

CERCLA, 42 U.S.C. §§ 9601(21) and 9607.

36. The Defendant BNSF is an owner or operator of the Site within the meaning of Section 107(a)(1) of CERCLA, 42 U.S.C. § 9607(a)(1), and was an owner or operator of the Site at the time of disposal of hazardous substances at the Site within the meaning of Section 107(a)(2) of CERCLA, 42 U.S.C. § 9607(a)(2).

37. There have been releases or substantial threatened releases of hazardous substances into the environment at and from the Site within the meaning of Sections 101(22), 104, 106, and 107(a) of CERCLA, 42 U.S.C. §§ 9601(22), 9604, 9606, and 9607(a).

38. The Site is a “facility” within the meaning of Sections 101(9) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(9), and 9607(a).

39. The United States and the State have undertaken and may undertake response action in the future at the Site, in response to releases or substantial threatened releases of hazardous substances from the Site into the environment within the meaning of Sections 104 and 107(a) of CERCLA, 42 U.S.C. §§ 9604 and 9607(a).

40. As a result of such releases or threatened releases of hazardous substances from the Site, the United States and the State have incurred response costs within the meaning of Section 101(25) and 107(a) of CERCLA, 42 U.S.C. §§ 9601(25) and 9607(a).

41. The United States and the State will continue to incur response costs in response to the release or threatened release of hazardous substances from the Site.

42. The response actions of the United States and the State were not inconsistent with the National Oil and Hazardous Substance Pollution Contingency Plan, 40 C.F.R. Part 300.

43. The Defendant BNSF is liable to the United States and the State for all costs of response action incurred and to be incurred by the United States and the State relating to the Site,

pursuant to Section 107(a) of CERCLA, 42 U.S.C. § 9607(a).

SECOND CLAIM FOR RELIEF- INJUNCTIVE RELIEF UNDER CERCLA

44. The allegations in paragraphs 1 through 43 of this Complaint are realleged and incorporated herein by reference.

45. The Regional Administrator of EPA, Region 6, has determined that there is or may be an imminent and substantial endangerment to the public health or welfare or the environment because of actual or threatened releases of hazardous substances at or from the Site.

46. The United States and the State are entitled to injunctive relief, pursuant to Section 106(a) of CERCLA, 42 U.S.C. § 9606(a), requiring Defendant to perform work required to abate conditions that present or may present an imminent and substantial endangerment to the public health or welfare or the environment, including the work required to implement the ROD.

THIRD CLAIM FOR RELIEF – INJUNCTIVE RELIEF UNDER STATE LAW

47. The allegations in paragraphs 1 through 46 of this Complaint are realleged and incorporated herein by reference.

48. The Defendant BNSF is a person within the meaning of the WQA, NMSA 1978, §§ 74-6-2(H) and 74-6-11(A), and within the meaning of the HWA, NMSA 1978, §§ 74-4-3(M) and 74-4-13(A).

49. The Environment Department has determined that the past or current handling, storage, treatment, transportation, or disposal of hazardous or solid wastes at the Site may present an imminent and substantial endangerment to health or the environment. The Environment Department has also determined that a pollution source or combination of sources at the Site poses an imminent and substantial danger to public health.

50. The State is entitled to injunctive relief requiring Defendants to perform work

required to abate conditions that present or may present an imminent and substantial endangerment to health or the environment, including the work required to implement the ROD.

PRAYER FOR RELIEF

Wherefore, the United States requests that this Court enter Judgment in favor of the United States and the State of New Mexico and against BNSF:

(A) Awarding the United States and the State reimbursement of all costs incurred and paid by them in responding to releases or threatened releases of hazardous substances at the Site, including all costs of investigation, cost recovery and enforcement related to such releases and this suit, including the cost of attorney time, plus prejudgment interest;

(B) Requiring BNSF to perform work required to abate conditions that present or may present an imminent and substantial endangerment to the public health or welfare or the environment, including the work required to implement the ROD and the work required to implement any future response actions for the Site determined to be necessary by EPA;

(C) Declaring, pursuant to Section 113(g) of CERCLA, 42 U.S.C. § 9613(g), BNSF's liability for response costs or damages that will be binding on any subsequent action or actions to recover further response costs or damages in connection with the Site; and

(D) Awarding such other and further relief as the Court may deem just and proper.

Respectfully submitted,

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